

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

Petition of Frontier and Citizens
ILECs
For Forbearance Under 47 U.S.C.
Section 160(c) from Title II and
Computer Inquiry Rules with
Respect to their Broadband
Services

WC Docket No. 06-147

**REPLY COMMENTS OF THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

The California Public Utilities Commission and the People of the State of California (“CPUC” or “California”) hereby respectfully submits these reply comments on the petition of Frontier and Citizens ILECs (“Frontier”) in the above-captioned matter. The CPUC urges the Federal Communications Commission (“Commission” or “FCC”) to issue an order addressing the Frontier petition and the earlier filed petitions of other incumbent local exchange carriers (“ILECs”) seeking similar forbearance treatment for their broadband services. A written FCC order is necessary here to: i) address concerns raised by parties as to whether the forbearance sought in the pending petitions meets the requirements of section 10 of the Communications Act; and ii) provide guidance to the industry and state commissions as to the exact scope of forbearance that is granted.

BACKGROUND

On December 20, 2004, Verizon filed a petition with the FCC for forbearance from Title II of the Communications Act of 1934, as amended, (“Act”) and the FCC’s *Computer Inquiry* rules.¹ On March 19, 2006, because the FCC failed to act and issue an order, the Verizon petition was deemed granted by operation of law.² Since the grant of Verizon’s forbearance petition, a number of incumbent local exchange carriers (“ILECs”) (BellSouth, Qwest, AT&T, Embarq Local Corporation) have filed similar “me, too” petitions with the FCC also seeking forbearance for their broadband services.³ These petitions are pending but the comment cycle has closed.

Recently, on August 4, 2006, Frontier and Citizens Communications Incumbent Local Exchange Telephone Carriers (“Frontier/Citizens”) filed the above-captioned petition with the Federal Communications Commission

¹ The Commission extended the forbearance deadline to March 19, 2006, and Verizon amended its petition on February 7 and 17, 2006 to clarify, among other things, the broadband services for which it was seeking forbearance.

² See News Release, *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services is Granted by Operation of Law*, WC Docket No. 04-440 (March 20, 2006). Pursuant to Section 10(c) of the Act, a forbearance petition is deemed granted if the Commission does not deny the petition within “one year after the Commission receives it, unless the one year period is extended by the Commission.”

³ See Public Notice, *Pleading Cycle Established for Comments on BellSouth Petition for Forbearance from Title II and Computer Inquiry Rules*, DA 06-1490 (July 21, 2006); Public Notice, *Pleading Cycle Established for Comments on Qwest and AT&T Petitions for Forbearance from Title II and Computer Inquiry Rules*, DA 06-1464 (July 19, 2006); Public Notice, *Pleading Cycle Established for Comments on Embarq Local Operating Companies Petitions for Forbearance Under 47 U.S.C. Section 160© Application of Computer Inquiry and Certain Common Carriage Requirements*, DA 06-1545 (July 28, 2006).

(“FCC”) for forbearance pursuant to 47 U.S.C. Section 160(c) from Title II and *Computer Inquiry* rules with respect to certain broadband services.⁴

⁴ Public Notice, *Pleading Cycle Established for Comments on The Frontier and Citizens Communications Incumbent Local Exchange Telephone Carriers Petition for Forbearance Under 47 U.S.C. 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, DA 06-1671 (August 23, 2006).

A. Verizon Forbearance Petition

The Verizon petition sought forbearance from two principal categories of services: packet switched services capable of 200 kbps in each direction; and non-TDM based high speed optical networking, hubbing, and transmission services.⁵ According to the Verizon petition, the following services fall under each category:

Packet switched services

Frame Relay Service (FRS)

ATM Cell Relay Service

Internet Protocol-Virtual Private Network (IP-VPN)

Transparent LAN Service (TLS)

LAN Extension Service

Non-TDM based Optical

Custom Connect

IntelliLight Broadband Transport (IBT)

Verizon Optical Networking

Optical Hubbing Service (OHS)

IntelliLight Optical Transport Service (IOTS)

Services that Verizon excluded from its request for forbearance were traditional special access services (DS1 and DS3) and TDM-based special access services and optical networking. In support of its petition, Verizon claimed that there is enough competition for broadband services and thus Title II and *Computer Inquiry* regulation is no longer necessary to ensure just and reasonable rates, or to protect consumers and the public interest.

⁵ Verizon Ex Parte Letter (February 7, 2006) at 2-3.

The Verizon petition went on to explain that the following regulations are no longer necessary: i) Title II regulation that requires, among other things, tariff filing, cost support, and pricing requirements; and ii) *Computer Inquiry* rules that require Verizon to unbundle transmission services and offer the transmission component pursuant to tariffed cost-based terms and conditions. Verizon also clarified that it “does *not seek* forbearance of federal universal service obligations for the services at issue in this petition ... [and it] will continue to pay federal universal service on the services that are subject to the petition.”⁶ Aside from its clarification that it does not seek forbearance of universal service obligations, the Verizon petition does not explicitly state whether it seeks exemption from *all other* rules and regulations under Title II and the *Computer Inquiry* rules.

B. Other ILEC Petitions for Forbearance

The pending ILEC petitions seek similar forbearance relief for broadband services as sought by the Verizon petition but vary in some respects.

The BellSouth petition seeks the same relief as the Verizon petition without variation.⁷ The AT&T petition interprets the relief that was granted to Verizon as encompassing forbearance from “*all* common carrier provisions

⁶ Verizon Ex Parte Letter (February 17, 2006) (emphasis added).

⁷ BellSouth Petition at 3. However, BellSouth recognizes that in the “absence of an explicit order, some uncertainty exists as to the exact scope of relief flowing from the Verizon petition.”

of Title II of the Communications Act of 1934... (except the permissive authority contained in section 254(d) that authorizes the Commission to require universal service contributions from providers of interstate telecommunications); *all* Commission regulations implementing the common carrier provisions of Title II... and *all* regulations and requirements derived from the Commission’s *Computer Inquiry* decisions.”⁸ Thus, AT&T interprets the FCC’s “grant” of the Verizon petition broadly. AT&T asserts that its market power is irrelevant, but acknowledges that its market share is “slightly higher” than Verizon’s.⁹

In contrast to AT&T’s broad interpretation of the scope of relief granted to Verizon, the Embarq petition defines the relief granted to Verizon more narrowly as: i) relief from *Computer Inquiry* rules that require ILECs such as Embarq to tariff and offer the transport component of its broadband services on a stand-alone basis and to take service under those same terms and conditions; and ii) forbearance from Title II rules regarding tariffs, prices, cost support, price caps and price flexibility.¹⁰ The Embarq petition specifically notes that it does not seek relief from the CALEA obligations

⁸ See AT&T Reply Comments, WC Docket No. 06-125, No. 06-147 (August 31, 2006) at 6.

⁹ As noted by AdHoc Telecommunications Users Committee, the “new” AT&T “has an absolute monopoly at about 99% of buildings.” AdHoc Telecommunications Users Committee comments, WC Docket No. 06-125 (August 31, 2006) (“AdHoc”) at 14.

¹⁰ Embarq Petition at 2.

under Title II (in contrast to the Verizon petition) or from universal service obligations.¹¹

Qwest's petition appears to seek a broader scope of forbearance than Verizon or any of the other ILEC petitions; the Qwest petition deviates in the following ways:¹²

- Qwest states it seeks forbearance from “any broadband services it...may offer”¹³ and thus is arguably broader than the Verizon petition, which only seeks forbearance for those services specifically identified.
- The Qwest petition does not specifically state that it excludes TDM-special access services from forbearance, unlike the Verizon petition.
- The Qwest petition does not include any language asserting that it will continue to pay federal universal service contributions on the services for which it seeks forbearance.

The Frontier petition “seeks the same relief” as granted to Verizon, for the same categories of broadband services that Verizon identified. The Frontier petition appears to follow the Verizon petition closely and similarly specifies that it *does not seek relief* from universal service obligations.¹⁴

DISCUSSION

Parties have raised concerns as to whether the Frontier petition (and other pending ILEC petitions) has demonstrated that the statutory test for

¹¹ Embarq Petition at 2.

¹² It is not clear if the Qwest petition's deviations are intentional or merely oversights.

¹³ Qwest Petition at 1.

¹⁴ The Frontier Petition does not mention whether its petition excludes CALEA, in contrast to the Embarq petition.

forbearance has been met. Section 10 of the Act contains a three-pronged test that the Commission must apply in evaluating a request for forbearance. The test requires that the FCC find that: 1) enforcement of the regulations is not necessary to ensure that rates, terms and conditions will be just and reasonable and not unjustly or unreasonably discriminatory; 2) enforcement of regulations are not necessary for protection of consumers; and 3) forbearance is consistent with the public interest. *See* 47 U.S.C. Section 160. The CPUC notes that in the absence of a written order, there is no way to determine whether the forbearance petitions have met these requirements. The CPUC urges the FCC to apply the forbearance test of 47 U.S.C. Section 160 to ensure that such conditions have been met, and to the extent that it grants forbearance, clarify the parameters or scope of any such forbearance granted to the ILECs (including Verizon).

MontanaSky.Net opposes the Frontier petition and notes that, contrary to the Frontier assertions, “‘robust’ broadband competition does not exist throughout the nation.”¹⁵ Specifically, MontanaSky.Net argues that it has not been able to negotiate a written agreement with Frontier for wholesale broadband services for nearly one year. Sprint Nextel also has concerns as to whether the forbearance requirements have been met. Sprint Nextel and other parties question the state of competition in the broadband markets, the

¹⁵ MontanaSky.Net Comments, WC Docket No. 06-147 (September 13, 2006).

ability of carriers to obtain wholesale broadband services from the ILECs (if forbearance were granted), and whether forbearance would negatively affect the public interest and consumers.¹⁶ The CPUC urges the FCC to address the concerns raised by these parties and *set forth analysis of whether the forbearance test* under 47 U.S.C. Section 160(a) has been satisfied. As Commissioner Copps noted in his statement accompanying the FCC press release announcing grant of Verizon's petition, there is "no document, no stitch of analysis, no trace of discussion, nothing that a court can use to gauge where the Commission is coming from."¹⁷ Any lack of analysis by the FCC raises questions as to whether the forbearance test has in fact been met.

In addition, some parties have commented that there still remains a considerable amount of confusion surrounding the exact services for which forbearance is sought. The services are in some cases branded with proprietary names; and further, it is unclear whether the different ILEC petitions have identified the same broadband services. AdHoc Telecommunications User Committee points out in its comments on the other ILEC petitions that the petitions "purport to exclude two services" from their forbearance requests (DS1/DS3 services and TDM-based special access) but

¹⁶ *See, e.g.* Sprint Nextel Comments in Opposition to Petition for Forbearance, WC Docket No. 06-147 (September 13, 2006); Opposition of Time Warner Telecom, Inc., CBeyond Communications LLC, and One Communications Corp., WC Docket No. 06-125, 06-147 (August 17, 2006); AdHoc Telecommunications Users Committee Comments, WC Docket No. 06-125 (August 31, 2006); Montanasky.net Comments (September 13, 2006).

¹⁷ *Commissioner Michael J. Copps in Response to Commission Inaction on Verizon's Forbearance Petition* (March 20, 2006).

DS1/DS3 special access channels are “tariffed components of the services for which they explicitly seek forbearance.”¹⁸ Given this lack of clarity regarding the broadband services at issue in the forbearance petitions, the FCC should clarify in written order(s) exactly which services are at issue in the petitions.

Finally, as evident even by the ILEC petitions, parties are unclear as to the exact scope of forbearance granted to Verizon. Most of the ILEC petitions appear to seek forbearance from the pricing regulations of Title II and the structural separation requirements of the *Computer Inquiry* rules, but the AT&T petition appears to seek forbearance from *all* Title II and *Computer Inquiry* rules. Even Frontier acknowledges that “[i]n the absence of an explicit order, some uncertainty exists as to the exact scope of relief flowing from the Verizon petition.”¹⁹ Commissioner Copps noted that a lack of a decision suggests that the following common carriage regulations are at risk: CALEA, universal service,²⁰ privacy rules, disability access requirements, rate regulation, interconnection in rural areas, interconnection between

¹⁸ See AdHoc Comments at 19-20. AdHoc notes that the ILECs’ assertion that “TDM services” would be excluded from forbearance is meaningless, because business customers do not purchase any class of service called “TDM service.” AdHoc states that TDM multiplexing is simply a technology that enables a carrier to transmit multiple signals simultaneously over a single transmission path and thus, if TDM-equipment is connected to a loop, it would be subject to Title II regulation but if the same loop were provisioned using packet-based multiplexing electronics, it would not be subject to regulatory protections. AdHoc Comments at 22.

¹⁹ Frontier Petition at 3.

²⁰ Even though Verizon noted that it was not seeking forbearance from universal service obligations for these services, in the absence of a written decision, it is unclear whether the FCC will continue to exercise universal service regulation over these ILEC broadband services.

different technologies, and enforcement for unlawful behavior.²¹ To the extent that forbearance is granted to the pending petitions, written orders should clarify exactly to what extent not only pricing and structural separation rules would no longer be enforced, but also whether other Title II requirements such as the above would remain enforceable.

CONCLUSION

For the foregoing reasons, the CPUC urges the Commission to apply the statutory forbearance analysis to the pending Frontier petition (and other ILEC forbearance petitions), and if forbearance is granted, issue a written order clarifying: i) the exact services that are at issue and subject to forbearance; and ii) the scope of regulatory forbearance, *i.e.*, the regulations that the FCC will and will not apply to the ILEC broadband services.

Respectfully submitted,

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²¹ Forbearance from requirements such as interconnection would affect the CPUC's authority over arbitrating and mediating any interconnection disputes regarding broadband services (to the extent that the services are subject to interconnection and pricing requirements).

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